

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Rule on Motions Concerning
Mail Preparation Changes

Docket No. RM2016-6

PUBLIC REPRESENTATIVE COMMENTS ON REVISED NOTICE

(May 1, 2017)

I. INTRODUCTION

Pursuant to Commission order issued March 27, 2017, the Public Representative hereby responds to the Commission's request for comments on its Revised Notice of Proposed Rulemaking proposing to amend the Commission's rules of practice at 39 C.F.R. § 3010.25 by adding a new paragraph (d)(5) styled "*Procedures for mail preparation changes*."¹

This docket commenced on January 22, 2016 with a Commission notice in Order No. 3048 proposing to change its Motions rules to add a section concerning mail preparation changes.² On February 23, 2016, the Commission ordered this proceeding held in abeyance pending resolution of the Postal Service's motion for reconsideration of Order No. 3047 in a related proceeding, Docket No. R2013-10R.³ On July 20, 2016, the Commission ruled on the Postal Service's motion,⁴ and subsequently reinstated this

¹ Revised Notice of Proposed Rulemaking, Order No. 3827, March 27, 2017 (Revised Notice). 82 FR 16015 (Mar, 31, 2017). Comments are due May 1, 2017, 30 days after publication of the notice in the *Federal Register*.

² Notice of Proposed Rulemaking on Motions Concerning Mail Preparation Changes, Order No. 3048, January 22, 2016 (Order No. 3048).

³ Order Holding Rulemaking in Abeyance, February 23, 2016 (Order No. 3096) at 1.

⁴ Docket No. R2013-10R, Order Resolving Motion for Reconsideration of Commission Order No. 3047, July 20, 2016 (Order No. 3441). The Postal Service filed petitions for review of Commission order

proceeding and established new dates for filing comments.⁵ Upon consideration of the comments, the Commission issued its Revised Notice.

II. PUBLIC REPRESENTATIVE'S POSITION

Subject to the outcome of the appeal of Commission Order Nos. 3047 and 3441, the Public Representative supports the proposed procedural rule with clarification of the Postal Service's noticing procedure and one minor language revision suggested below.

III. BACKGROUND

A. Procedural History

The genesis of this rulemaking arises from a series of events following a Postal Service notice of operational changes published in its Domestic Mail Manual (DMM) to modify the eligibility requirements for mailers to qualify for automation First-Class, Standard, Periodicals, and Package Services rates. 78 Fed. Reg. 23137 (April 18, 2013). On September 26, 2013, the Postal Service filed notice with the Commission of a planned price adjustment for market dominant products.⁶ In its Notice, the Postal Service failed to account properly for the planned implementation of its changed mail eligibility requirements. The Postal Service did not adjust its billing determinants to reflect the impact on its rates resulting from the DMM changes.

On November 21, 2013, the Commission determined that the Postal Service failed to take into account the impact of announced operational changes and did not

Nos. 3047 and 3441. *U.S. Postal Service v. Postal Regulatory Commission*, No. 16-1284 (D.C. Cir. filed August 11, 2016).

⁵ Notice Reinstating Rulemaking, July 27, 2016. Comments were due September 2, 2016, 30 days after publication of the reinstatement notice in the federal register. 81 Fed. Reg. 51145 (August 3, 2016).

⁶ Docket No. R2013-10, United States Postal Service Notice of Market-Dominant Price Adjustment, September 26, 2013 (Notice).

properly utilize historical volumes for its billing determinants.⁷ The Commission ruled that the Postal Service's new mailing requirements "constitute a classification change with rate implications pursuant to 39 U.S.C. § 3622(d)(1)(A) and 39 C.F.R. § 3010.23(d)." Order No. 1890 at 2.

The Postal Service appealed Order No. 1890 to the D.C. Circuit Court of Appeals. On May 12, 2015, the court affirmed the Commission's authority to determine when mail preparation changes affect the application of the price cap under 39 U.S.C. § 3622(d).⁸ However, the court further concluded that Order No. 1890 failed to "articulate a comprehensible standard for the circumstances in which a change to mail preparation requirements will be considered a "change in rates." *USPS v. PRC*, 785 F.3d at 753. Accordingly, the court remanded the case to the Commission to "enunciate an intelligible standard...." *Id.* at 756.

On January 22, 2016, the Commission issued an order to resolve the matters raised by the court's remand.⁹ The Commission's order articulated a standard to determine when mail preparation changes affecting market dominant mail require compliance with § 3010.23(d)(2). That standard is:

[A] mail preparation change has rate effects where it results in either the deletion or the redefinition of a rate cell. A rate cell will be considered "redefined" where the mail preparation change results in a significant change to a basic characteristic of the mailing. *Id.* at 59.

⁷ Docket No. R2013-10, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, November 21, 2013 (Order No. 1890) at 23-24.

⁸ *United States Postal Service v. Postal Regulatory Commission*, 785 F.3d 740, 744 (D.C. Cir. 2015).

⁹ Docket No. R2013-10R, Order Resolving Issues on Remand, January 22, 2016 (Order No. 3047).

Order No. 3047 also expressed the Commission's intention to initiate a rulemaking to establish procedural rules "governing mail preparation changes that require price cap compliance." *Id.* The Revised Notice proposes those procedural rules.

B. Proposed Rule

The Revised Notice proposes to amend chapter III of title 39 of the Commission's Rules in the code of Federal Regulations as follows:

§ 3010.23 Calculation of percentage change in rates.

* * * * *

(d) * * *

(5) *Procedures for mail preparation changes.* The Postal Service shall provide published notice of all mail preparation changes in a single, publicly available source. The Postal Service shall file notice with the Commission of the source it will use to provide published notice of all mail preparation changes. When providing notice of a mail preparation change, the Postal Service shall affirmatively state whether or not the change requires compliance with paragraph (d)(2) of this section. If raised by the Commission or challenged by a mailer, the Postal Service must demonstrate, by a preponderance of the evidence, that a mail preparation change does not require compliance with paragraph (d)(2) of this section in any proceeding where compliance is at issue.

* * * * *

No other change in Commission rules is now proposed in this proceeding.

IV. DISCUSSION

A. The Proposed Rule Eliminates Previous Concern of a Regulatory Gap.

The revised proposed rule will close a potentially significant regulatory gap in the original proposal. The Public Representative pointed out in previous Comments that the

Commission is obligated to apply the price cap's annual limitation and to review and enforce the PAEA's prohibition of price cap breaches. Order No. 3047 at 39. It was not clear that the proposed rule would sufficiently alert the Commission of a potential rate effect due to a mail preparation change. The proposed rule did not ensure that the Postal Service would undertake to meet its burden of determining, in the first instance, whether a mail preparation change requires a rate filing.

The initial Notice in this proceeding explained that Order No. 3047 places an affirmative burden on the Postal Service to determine whether the mail preparation change has a rate effect. Notice at 2, 5. That is, whether a change of mail preparation requirements will result in a deletion or redefinition of a rate cell.¹⁰ The Commission should not abdicate its responsibility to administer the price cap rules by not ensuring consideration of whether rate cells are effectively deleted or redefined by such changes, whether noticed in the DMM or elsewhere. There was no check to ensure the Postal Service actually and fully considered in good faith, or otherwise, the impact of an operational change on rate cells.

The Public Representative believes that the revised rule would remove that regulatory gap by providing for a method to sufficiently alert the Commission and other interested parties about mail preparation changes. The proposed rule requires an express Postal Service statement of whether or not the change requires compliance with paragraph (d)(2) of section 3010.23.

¹⁰ Order No. 3047 presents the standard for determining when a classification change requires compliance with the price cap rule which the Postal Service is required to comply with under § 3010.23(d)(2), *i.e.* where the mail preparation change results in either the deletion of a previously available rate cell or significantly changes the basic characteristic of the mailing so that the rate cell can be considered "redefined." Order No. 3047 at 16.

B. The Revised Rule Will Be More Visible in Section 3010.23(d) than in the Motions Rules as Previously Proposed.

In previous Comments, the Public Representative expressed concern that the location of the proposed rule within the Motions section of the Commission's regulations would obscure its availability. The Public Representative believes that the rule incorporated as § 3010.23(d)(5) will be more readily appreciated and that interested parties will be more likely to recognize that they may challenge the Postal Service's conclusions regarding compliance with paragraph (d)(2) of that section.

C. The Proposed Rule Appropriately Eliminates the Original Requirement of a 30-Day Period for Filing a Motion under §3001.21(d).

The proposed rule eliminates the 30-day time frame for challenges to the Postal Service's determination that a mail preparation change does not effect a rate change. The last sentence of the rule proposed in Order No. 3048 stated: "Motions concerning mail preparation changes must be filed at least 30 days *after* a party has actual or constructive notice of the implementation date of the change." (Emphasis supplied.) Notice at 7.

The revised proposed rule is more appropriate. The rule permits interested persons to challenge at any time a Postal Service's decision that a mail preparation change is not a rate change.

D. The Rule Does Not Specify Whether Published Notices Must Be in a Single Source.

The proposed rule requires: "The Postal Service shall file notice with the Commission of the source it will use to provide published notice of all mail preparation changes." It appears the proposed rule requires a singular source for the published notices. However, the Postal Service has previously indicated that mail preparation requirements are communicated in more than one publication; such as the DMM or the

Postal Bulletin or sometimes by other more informal methods. The Commission's order should make clear whether one particular publication (as selected by the Postal Service) must provide notification of all mail preparation changes. Obviously, it would be more convenient for the Commission and interested persons if all changes are noticed in at least in a single source, even if notice is also sometimes provided elsewhere.

E. For Clarity, the Last Sentence of the Proposed Rule Should Be Revised.

The last sentence of the proposed rule begins with the phrase, "If raised by the Commission or challenged by a mailer, the Postal Service must demonstrate" that compliance with subsection (d)(2) is not required. While it is clear what a challenge by a mailer means, it is not clear what action "raised by the Commission" is intended to cover.

The following language is suggested in lieu of the last sentence of the proposed rule. Add, after "If" in the last sentence, "the Postal Service's determination regarding compliance with (d)(2) of this section is questioned", and delete "raised." The sentence would read:

If the Postal Service's determination regarding compliance with (d)(2) of this section is questioned by the Commission or challenged by a mailer, the Postal Service must demonstrate, by a preponderance of the evidence, that a mail preparation change does not require compliance with paragraph (d)(2) of this section in any proceeding where compliance is at issue.

V. CONCLUSION

The Public Representative respectfully submits the foregoing comments for the Commission's consideration.

Respectfully submitted,

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